NO. 16148

United States
COURT OF APPEALS
for the Ninth Circuit

HAMISH SCOTT MacKAY,

Appellant,

v.

EUGENE D. McALEXANDER, Acting District Director, District 31, Immigration and Naturalization Service,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE., 3-6-59—40

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JURISDICTIONAL STATEMENT

The jurisdiction of the District Court was invoked under 28 USC § 2241 and 5 USC § 1009. The jurisdiction of the Court of Appeals is invoked under 28 USC §§ 2253 and 1291.

This is an appeal from an Order of the United States District Judge for the District of Oregon dismissing appellant's Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief

to Prevent Agency Action, discharging the Writ of Habeas Corpus theretofore issued and remanding the appellant to the custody of Eugene D. McAlexander, then Acting District Director, Immigration & Naturalization Service, United States Department of Justice, to be held for deportation, pursuant to the Warrant and Order of Deportation previously issued (R. 58).*

STATEMENT OF THE CASE

While the statement of facts in appellant's brief is substantially correct insofar as set forth, certain other important facts as they pertain particularly to the issues urged in appellant's first round through the courts (*MacKay v. Boyd,* 9 Cir. 1955, #13841, 218 F.2d 666; cert. den. (1955) 350 U.S. 840; reh. den. (1956) 351 U.S. 929), when compared to the propositions urged in the within cause, together with a brief summary of the testimony upon which the deportability of appellant has been based, materially alter the questions presented in appellant's brief.

The appellant is an alien, having been born in Canada on June 10, 1905. He last entered the United States on or about November 24, 1928 (not in 1958, App. Br. 2).

The evidence as to appellant's membership in the Communist Party was established by the testimony of

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* As in appellant's brief, "(R.....)" herein refers to the printed record of the proceedings in the United States District Court, and "(Tr.....)" refers to Exhibit 1 of the typewritten transcript of the hearings before the Immigation & Naturalization Service.

four witnesses: Lee A. Knipe, Irene Mahoney, Robert McClure Hood and Sylvia Maria Sivertson, all of whom participated actively in the Communist Party functions in the Albina Branch at Portland, Oregon, of which appellant was a member.

Knipe testified that he was a member of the Communist Party in Portland from 1937 to 1940 (Tr. 14). He was Educational Director of the Albina Branch. He and appellant had been selected by the Executive Board of the Albina Branch to attend Communist Party schools and training classes (Tr. 15), the instructors being Jim Murphy, State Organizer of the Communist Party, and Andy Reams, Educational Director of Communist Party, State of Washington (Tr. 16). Meetings were held for the purpose of electing James Murphy, who was running on the Communist Party ticket, to the State Senate (Tr. 17). Appellant attended closed meetings of the Communist Party (Tr. 17, 18), where only known Communists attended (Tr. 18).

Irene Mahoney, formerly Mrs. Lee A. Knipe, was a member of the Albina Branch of the Communist Party from 1938 through 1940 (Tr. 22) and attended closed meetings open only to members of the Party (Tr. 23) and appellant attended four or five of these meetings when she was present (Tr. 24).

Robert McClure Hood joined the Communist Party in November 1940 and remained a member until he was expelled in March 1942 (Tr. 442). He attended closed Party meetings at which appellant was present (Tr. 445). After reading Communist Party literature

setting forth its dangerous aims, he went to the police (Tr. 474). The witness first met appellant at a meeting of the Workers Alliance (Tr. 441) and thereafter became well acquainted with appellant.

Sylvia Marie Sivertson was a former wife of appellant, having married him in 1933, and they were divorced in 1944 (Tr. 748). Appellant had been a member of the Communist Party and he prevailed upon her to join the Party in 1935 (Tr. 750). Thereafter they attended Communist Party meetings together (Tr. 751). For approximately six months she was Secretary of the Albina Branch where she collected Communist Party dues, including dues from the appellant (Tr. 752). Appellant was active in the solicitation of new members by stenciling "Join the Communist Party" on the sidewalks (Tr. 752, 753), direct solicitation, and distribution of leaflets put out by the Party (Tr. 758, 759). Appellant was active in discussing Communism with people (Tr. 753), which continued through 1943 when both she and appellant were employed in the shipyards (Tr. 755). They together attended Communist Party schools, the purpose of which was to teach members "Russian history and everything in regard to the Communist Party work—and the fundamentals of Communism, Marxism and Leninism." Textbooks were used for study (Tr. 757).

In appellant's first Petition for Writ of Habeas Corpus which formed the basis for appellant's first appeal, hereinbefore mentioned, he did not raise the question of citizenship, but he did raise the question of fairness and impartiality of the hearings, and the suf-

ficiency of the evidence, claiming that the finding that he was a Communist was false and without a basis in fact. He also challenged the constitutionality of the statutes under which he was charged, alleging that they amounted to bills of attainder and *ex post facto* laws. From an adverse decision of the court below, appellant appealed, and this Court of Appeals in *MacKay v. Boyd, supra,* held *per curiam* that there was abundant evidence to support the contention that he was a member of the Communist Party.

Pursuant to appellant's motion to reopen the hearing for the purpose of filing an Application for Suspension of Deportation, a rehearing was held on May 16, 1956, and on June 21, 1956, the Hearing Officer denied appellant's Application for Suspension of Deportation on the ground that the petitioner refused to answer questions regarding membership in various organizations, including the "Committee for Protection of Oregon Foreign Born," as did his wife (Tr. 848, 851-855, 870). The Hearing Officer, in his report on June 21, 1956, at page 3, noted that: "In fact, many of the respondent's answers were evasive. He has elected to stand mute and refused to disclose information which is material to a determination as to whether he merits suspension of deportation." Upon appeal the Hearing Officer's determination was sustained and the appeal dismissed.

Subsequently, on March 5, 1958, petitioner again appealed to the Board of Immigration Appeals, requesting reconsideration of its determination of deportability on the basis of the decision of *Rowoldt v. Perfetto* (1957) 355 U.S. 115. Upon dismissal of this appeal,

appellant on June 18, 1958 filed the within Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action. In this petition and complaint, appellant again urged all of his prior contentions previously adjudicated by this court and in addition questioned appellant's deportability in view of the decision of the United States Supreme Court in *Rowoldt, supra.* Appellant further contended that the hearing on his Application for Suspension of Deportation was unfair in that the Hearing Officer was biased and prejudiced and was not impartial because he had acted as Hearing Officer in the original proceedings, and that the Order Denying Suspension of Deportation was arbitrary, capricious, and an abuse of discretion. After the hearing in the United States District Court for the District of Oregon, appellant filed his Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief to Prevent Agency Action, claiming for the first time to be a citizen of the United States as a basis for relief.

The District Court below, on August 15, 1958, having dismissed the petition and complaint on its merits, discharged the writ and remanded appellant to the Immigration & Naturalization Service to be held for deportation, pursuant to the Warrant and Order of Deportation previously issued.

On August 18, 1958, appellant filed a Notice of Appeal from this Order.

ISSUES

Appellee does not agree that there are properly before this court all of the issues as set forth by appellant (App. Br. 4, 5).

Appellee contends the only issues before this court are:

1. Was appellant afforded a fair hearing on his Application for Suspension of Deportation before the Immigration & Naturalization Service, Department of Justice?

2. Was the Order Denying Suspension of Deportation of appellant arbitrary, capricious and an abuse of discretion and otherwise not in accordance with law?

3. Is appellant a citizen of the United States and not subject to deportation?

4. Was the issue of the constitutionality of the Act of October 16, 1918, 40 Stat. 1012, as amended, fully adjudicated in appellant's earlier appeal, *MacKay v. Boyd, supra,* and therefore final?

5. Was the issue as to whether or not there was substantial, probative and reasonable evidence upon which the Immigration & Naturalization Service based its order of deportation upon membership of appellant in the Communist Party of the United States, fully adjudicated in the case of *MacKay v. Boyd, supra,* and therefore final?

APPELLANT'S PROPOSITION I

The District Court did not Err in Failing to Declare Unconstitutional the Act of October 16, 1918, as amended, now 8 USC § 1251(a)(6)(c), or in particular that the Act is Unconstitutional as being a Bill of Attainder.

This contention has been repeatedly passed upon by this and other courts. The same grounds were urged by appellant in his first round through the courts in *MacKay v. Boyd, supra,* where the decision of the court below was by this court affirmed *per curiam.* The identical grounds were also raised in the case of *Niukkanen v. Boyd,* 9 Cir. 1957, #15061, 241 F.2d 938; cert. den. (1957) 355 U.S. 905. Appellant in fact, at the very outset of his brief, page 6, admits that this proposition has been foreclosed by this court because of the decisions of the Supreme Court in *Harisiades v. Shaughnessy* (1952) 342 U.S. 580, and *Galvan v. Press* (1953) 347 U.S. 522. The decisions aforesaid were final and determinative of this issue. *Cruz-Sanchez v. Robinson,* 9 Cir. 1957, 249 F.2d 771. See also, *Rystad v. Boyd,* 9 Cir., 246 F.2d 246; cert. den. (1957) 355 U.S. 912; reh. den. (1958) 355 U.S. 967.

But counsel urges that the Supreme Court of the United States has not specifically ruled on the validity of the Act as it pertains to this class of case as constituting a bill of attainder. There is no reason to believe that the Supreme Court did not consider this contention in either the *Galvan* or *Harisiades* case. As Judge Solomon stated in his Memorandum Opinion in the

case of *Niukkanen v. Boyd, supra,* presently on appeal before this court, being Case No. 15061:

> "There is no merit in the contention that the Act is a bill of attainder. Although Mr. Justice Black in his dissenting opinion in Galvan v. Press, 347 U.S. 522, 533, mentioned this possibility, it is apparent that he did not believe that such provisions constituted a bill of attainder, and the majority opinion sustained the order of deportation."

APPELLANT'S PROPOSITION II

The District Court did not Err in Determining that Appellant was an Alien; that his Father was not an American Citizen at the time Appellant was Born and that Appellant is Subject to Deportation.

At the outset of the Immigration hearings and up to the time of the filing of an amended petition, appellant conceded that he was an alien. The government's proof was thereby supported and no further proof was necessary beyond the admissions of appellant himself. Since appellant has now raised the claim of citizenship by derivation, that is, through the claim that his father, James Scott MacKay, was a citizen of the United States at the time appellant was born in Canada, it became incumbent upon the government to establish that appellant was not, in fact, a citizen of the United States.

In the case of *Brader v. Zurbrick,* 6 Cir. 1930, 38 F.2d 472, it is stated that "Where claim of petitioner is not merely colorable, the claimant is entitled to a judicial hearing." The government's burden therefore

was to show either (1) that James Scott MacKay was a naturalized citizen of Canada and a subject of Her Britannic Majesty as a British subject at the time of appellant's birth; or (2) that appellant's father expatriated himself thereby losing his United States citizenship prior to appellant's birth in Canada. See *Riley v. Howes,* 1 Cir. 1928, 24 F.2d 686.

Concededly, appellant was born in Canada in 1905 and, concededly, his father had acquired a certificate of naturalization issued by the Canadian courts prior to appellant's birth (Ex. 15 Imm. File (referred to as Petitioner's Ex. 15, R. 103) Offered, Tr. 746; Admitted by Hearing Officer, Tr. 747). However, appellant contends that his father's naturalization in Canada was defective and that he consequently never lost his status as a naturalized citizen of the United States.

Naturalization in a Foreign State. At least since 1868 (R.S. § 1999), our laws have recognized the right of voluntary expatriation both by native-born and naturalized citizens. Even in the absence of any direct statutory provision, a citizen of the United States unquestionably lost his American citizenship by procuring naturalization in a foreign state, particularly when such naturalization was accompanied by a change of domicile. Both the majority and minority opinions in the Supreme Court's recent decision in *Terez v. Brownell* (1958) 356 U.S. 44, agreed that the voluntary acceptance of foreign allegiance through naturalization was the most obvious method of casting off United States citizenship. See also *Savorgnan v. U. S.* (1950) 338 U.S. 491. See also, 9 Op. Atty. Genl. 62:

> "In my opinion, if he emigrates, carries his family and effects with him, manifests a plain intention not to return, takes up his permanent residence abroad, and assumes the obligation of a subject to a foreign government, this would imply a dissolution of his previous relations with the United States, and I do not think we could or would afterwards claim from him any of the duties of a citizen."

The Court in *In re Look Tin Sing,* Cir. Ct. D. Calif. 1884, 21 F. 905, quoted this Opinion of the Attorney General with approval and stated, "The doctrine thus stated has long been received in the United States as a settled rule of public law; . . ."

Consequently, at the time of MacKay's birth in Canada in 1905, his father had lost the status he had acquired as a naturalized American Citizen by virtue of his obtaining naturalization in Canada. As a Canadian, he obviously could not transmit United States citizenship to his son. Moreover, MacKay did not acquire United States citizenship through his mother. Even assuming that the mother retained United States citizenship following her establishment of foreign residence and her husband's naturalization in Canada, which at best is extremely doubtful, the mother could not confer United States citizenship at birth upon the child born in Canada. *In re Wright,* E.D. Pa. 1937, 19 F. Supp. 224, and cases there cited and discussed. Revised Statutes § 1993 then authorized transmission of American citizenship at birth abroad only when the father was an American citizen at the time of the child's birth. Since his father was an alien at the time

of his birth in 1905, MacKay was born an alien. *Wolf v. Brownell,* 9 Cir. 1957, 253 F.2d 141; cert. den. (1958) 357 U.S. 942.

Compliance with Canadian Requirements. At this late date, MacKay suddenly purports to discover that his father's Canadian naturalization was irregular because he believes his father had not resided in Canada for three years when he sought and was granted naturalization. In this regard, appellant on March 2, 1951, testified as follows:

> "Well, I understand that my dad went to Canada in 1903 and therefore he couldn't have been a resident of Canada for three years." (Tr. 745)

The present claim therefore seems quite far-fetched after the lapse of 53 years, during which the father and MacKay both regarded themselves as Canadian citizens and subjects of Great Britain.

This is clearly a collateral attack on appellant's father's naturalization in Canada. There has been no attempt to show that Canadian administrative or judicial authorities ever sought to revoke the father's naturalization. Under such circumstances, the courts of the United States could not be called upon to nullify the naturalization as granted in Canada.

Christie v. British American Oil Co., determined by the Manitoba Court of Appeals (1953) 8 WWR (NS) 714; aff. 8 WWR (NS) 39; 2 DLR 598 (Man. C. A.); aff. (1954) SCR 111, 2 DLR 65, pertains to a warrant issued out of a court for execution on certain shares of stock. Plaintiff claimed that the order and warrant

involved were nullities. The court said that the place to settle the illegality was in the Ontario courts where seizure was made and that a judgment or order cannot be treated as a nullity when attacked in a collateral proceeding unless the want of jurisdiction to make it is obvious on its face. See also *Tufts v. Thompson* (1929) 1 WWR 329, 24 CAN. Abr. 1174 (Man. C.A.); *Caldwell R.M. v. Children's Aid Society of St. Abellard* (1929) 1 WWR 323, 24 CAN. Abr. 1165 (Man. C. A.). In *R. E. Solvang,* 43 DLR 549, the court quoted *Piggott's Nationality,* Part 1, p. 203, as follows:

> "The decree on the petition, whether it be legitimacy or illegitimacy, of validity or invalidity of marriage, of the right or absence of right to be deemed a British subject is, from its nature, a judgment of status, and, as such, entitled to universal recognition.
>
> * * *
>
> "He means, of course, that according to international comity, judgments as to status rendered in the court of the domicile are accepted by all foreign courts . . ."

In this connection see also, the case of *Tutun v. U. S.* (1926) 270 U.S. 568, 577, in which a Federal District Court denied a petition of an alien to be admitted to citizenship in the United States and said:

> ". . . that upon such hearing the applicant and witnesses shall be examined under oath before the court and in its presence; and that every final order must be made under the hand of the court and shall be entered in full upon the record. The judgment entered, like other judgments of a court of record, is accepted as complete evidence of its own validity unless set aside. *Campbell v. Gordon,* 6 Cranch 176; *Spratt v. Spratt,* 4 Pet. 393, 408.

> It may not be collaterally attacked. *Pintsch Compressing Co. v. Bergin,* 84 Fed. 140. If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit."

Hence, it would appear that it was appellant's duty, if such a duty there existed, to take direct proceedings in Canada if appellant's father obtained the certificate through illegal or fraudulent means and have the same vacated, annuled and set aside. He cannot collaterally attack the determination of the Canadian courts in this proceeding. It would seem to be the duty of this court to give full faith and credit to the determination of the court in Canada admitting appellant's father to citizenship in that foreign state.

An order admitting an alien to citizenship has been repeatedly declared to be a judgment of the same dignity as any other judgment of a court having jurisdiction. It is an adjudication on personal status. Under such circumstances, it seems fanciful to assert that a court in this country can disregard a naturalization granted in Canada in 1905, merely on the basis of a belated assertion that the applicant then had not fully met the requirements established by Canadian law. Since the naturalization edict in Canada was never rescinded, it fully attests status as a Canadian citizen. See *Tutun v. U. S., supra,* at 577; *Spratt v. Spratt* (1830) 4 Pet. 393, 408, 7 L.Ed. 897.

Expatriation. In the court below, the government urged, and we now renew the contention, that even if the court should determine that appellant's father

had not become a naturalized Canadian citizen, he nevertheless lost his United States citizenship by expatriation, in taking the oath of allegiance prior to appellant's birth.

Since Canada is one of the Dominions of Great Britain, the oath of allegiance would have been to Her Majesty, the Queen of the United Kingdom of Great Britain and Ireland. We contend that irrespective of the residential requirements to enable appellant's father to become a citizen of Canada, the mere taking of the oath in and of itself would place upon him "duties and obligations absolutely inconsistent and at war with the duties he owes the home country and government he left, and he has also shown an unequivocal intent to remain abroad." *Ex parte Griffin,* N.D. N.Y. 1916, 237 F. 445, 451.

Appellant, however, contends that to expatriate a citizen of the United States would render him stateless and would be in violation of the treaty between the United States and Great Britain (App. Br. 13). In this regard, see *Ex parte Griffin, supra* where Griffin, a citizen of the United States, went to Canada and there enlisted in the armed forces of a foreign power and took the oath of allegiance to the King of Great Britain, and although Griffin in that case deserted within a few days and returned to the United States, he was declared to be an alien of the United States even though he had here not become a citizen of Canada and a subject of Great Britain. In that case, the court further stated (p. 450):

"Expatriation is the voluntary loss or abandonment, or, more properly speaking, renunciation, of citizenship. This may be a completed act, and complete in its effect as to the status of a person, even if he has not become naturalized in some other country according to its laws. Persons born in the United States, subject to its jurisdiction, are citizens of the United States. If one of these persons goes to England and is there naturalized, he becomes a citizen of England, regardless of the wishes or consent of the United States. He is exercising a natural and an inherent right, says the Congress of the United States. In such case he loses his citizenship in the United States on becoming a naturalized citizen of England. This is distinguished from expatriation, which may consist solely in the abandonment and renunciation of citizenship in the United States, without being naturalized in some other country. Of course, a citizen of the United States expatriates himself when he voluntarily goes to England, and there applies for citizenship and becomes naturalized. He has not only abandoned, but renounced, his citizenship in the United States, and become a citizen of another country. . . . Expatriation is renouncing allegiance to one's own government, accompanied usually by forsaking his own country.

* * *

"It follows that Griffin, the petitioner, not only expatriated himself under the statute of the United States, but by his oath changed his allegiance to that of the kingdom of Great Britain and Ireland, and necessarily renounced his allegiance to the United States, and at least took the preliminary steps to become a naturalized citizen of England. (p. 457)

* * *

"Does taking an oath of allegiance to a foreign power constitute expatriation? It was not a new question. See Case of J. F. Bowler, which arose in 1895, and communication of Secretary of State

Gresham in reference thereto, Foreign Relations, 1895, page 853, and VanDyne, Citizenship of the United States, 280. Secretary Gresham said:

> " 'The oath is inconsistent with his allegiance to the United States. By taking it he obligated himself to support the government of his adoption, even to the extent of fighting its battles in the event of war between it and the government of his origin. He could not bear true allegiance to both governments at the same time.' " (p. 458)

APPELLANT'S PROPOSITION III

The District Court did not Err in Refusing to Hold that Appellant was not Afforded a Fair Hearing on His Application for Suspension of Deportation.

The only basis for this contention by appellant is that the Hearing Officer, following the first hearing, had determined the matter adversely to appellant and ". . . had in effect decided that appellant was a liar and *his conclusion could only be that he would not grant suspension of deportation to a liar.* Under these circumstances it is clear that appellant has been denied an elementary aspect of due process of law, namely the right to a hearing before an impartial judge or hearing officer." (App. Br. 17) (Emphasis added)

This broad, sweeping statement, without some specific showing as a basis for it, should hardly merit an answer thereto. A reading of the record, including the pages referred to on page 3 of the Hearing Officer's report, conclusively shows appellant's evasiveness and his refusal to answer questions within the legitimate area

of the inquiry and justified the Hearing Officer's refusal to treat him as deserving of discretionary relief. The Hearing Officer found that appellant's refusal to answer was not warranted and that it might well be inferred from his refusal that a complete disclosure of the facts would not add to the alien's desirability as a resident. Particularly in point is the case of *Jimenez v. Barber,* 9 Cir. 1958, 252 F.2d 550, where the court said:

> "Here, the refusal to answer questions was in a proceeding in which the applicant sought nothing to which he was entitled as a matter of right. He asked only for an act of grace, dependent upon an official exercise of sound discretion. The hazards in adopting an obstructive attitude in such a proceeding must be at least as great as those involved in cases where established rights are sought to be enforced or protected." (p. 554)

Since suspension of deportation is a matter of grace, courts will not review its denial unless the ground stated is on its face insufficient.

APPELLANT'S PROPOSITION IV

The District Court did not Err in Refusing to Find the Order Denying Appellant's Suspension of Deportation was Arbitrary, Capricious and an Abuse of Discretion, and Otherwise not in Accordance with Law.

In the first paragraph of appellant's brief, page 19, after summarizing the basis under which appellant be considered for suspension of deportation under 8 USC § 1254(a)(5), he states:

> *"The special inquiry officer found that the appellant met these requirements* and in addition the

> requirement that his deportation would result in 'exceptional and extremely unusual hardship.' "

This is not quite correct. What the Special Inquiry Officer determined was that appellant was statutorily eligible for *consideration* of suspension of deportation. More particularly, the Act specifies that the Attorney General, under Part (c) of said section, *may* suspend the deportation of a deportable alien who meets the prerequisites set out in the Act.

The cases are legion and for the most part are uniform in applying the narrow scope of judicial review of agency action denying suspension of deportation. In *Arakas v. Zimmerman,* 3 Cir. 1952, 200 F.2d 322, 324, in the course of commenting upon the ultimate decision in *Bauer v. Shaughnessy,* Civil 50/217, S.D. N.Y. 1950, the following language was quoted with approval:

> " . . . the decision of the Attorney General in refusing discretionary relief to a deportable alien is not subject to judicial review at least where the ground stated for the refusal is not 'on its face insufficient.' United States ex rel Kaloudis v. Shaughnessy, 180 F.2d 489."

The Supreme Court of the United States, in the case of *Jay v. Boyd* (1956) 351 U.S. 345, has gone a considerable distance beyond the previous authorities. There, the denial of an application for suspension, based on the use of confidential information by the Board of Immigration Appeals, was sustained by a sharply-divided court. Not confined to the matter of the use of undisclosed information, however, is the following statement in that case—which unmistakably governs this court as to the present problem (p. 353):

> "Eligibility for the relief here involved is governed by specific statutory standards which provide a right to a ruling on an applicant's eligibility. However, Congress did not provide statutory standards for determining who, among qualified applicants for suspension, should receive the ultimate relief. That determination is left to the sound discretion of The Attorney General. The statute says that, as to qualified deportable aliens, The Attorney General 'may, in his discretion' suspend deportation. It does not restrict the considerations which may be relied upon or the procedure by which the discretion should be exercised. Although such aliens have been given a right to a discretionary determination on an application for suspension, cf. Accardi v. Shaughnessy, 347 U.S. 260, a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace,' Escoe v. Zerbst, 295 U.S. 490, 492, and 'cannot be demanded as a right,' Berman v. United States, 302 U.S. 211, 213. And this unfettered discretion of The Attorney General with respect to suspension of deportation is analogous to the Board of Parole's powers to release federal prisoners on parole."

But appellant urges (App. Br. 20) that the Special Inquiry Officer erred ". . . in his overruling of the various objections made by appellant's counsel during the course of this questioning and further, that appellant should not be deprived of suspension of deportation because he failed to answer questions which were not pressed by the government." A reading of the record, including the pages referred to on page 3 of the Special Inquiry Officer's report conclusively shows appellant's evasiveness and his refusal to answer questions within the legitimate area of the inquiry and justified the of-

ficer's refusal to treat him as deserving of discretionary relief. *Jimenez v. Barber,* 9 Cir. 1956, 235 F.2d 922, cert. den. 355 U.S. 903. Appellant was in this proceeding seeking relief from deportation. It was incumbent upon him to make a full and frank disclosure of all matters bearing upon his loyalty, good moral character and the desirability of granting him the right to become a lawful, permanent resident of this nation. His activities, the organizations to which he belonged or the principles with which he was in sympathy and the individuals with whom he maintained an association, were all open to inquiry. Appellant cannot now take refuge behind a situation of his own making. He should not now be heard to complain that the Special Inquiry Officer did not ". . . order the appellant to answer any of the questions which were put to him," or ". . . because he failed to answer questions which were not pressed by the government."

It is conceded that the order of the Board of Immigration Appeals Denying Suspension of Deportation is judicially reviewable; however, in the absence of a clear showing that the Attorney General abused the discretion vested in him to grant or deny suspension of deportation, the court has no power to interfere with the determination. There has been no showing in this case that the hearing was in any respect unfair or that the order denying suspension was arbitrary, capricious or an abuse of discretion.

APPELLANT'S PROPOSITION V

The District Court did not Err in Determining that Appellant was Subject to Deportation Based Upon Substantial, Probative and Reasonable Evidence that Appellant was a Member of the Communist Party, nor did the Court Err in Determining that the Decision of Rowoldt v. Perfetto was not in Point.

Appellant would have this court again reevaluate the evidence adduced at the deportation hearing and to redetermine whether or not the agency's findings were based upon reasonable, substantial and probative evidence. Their position is that they are entitled to the reconsideration of these issues by virtue of the *Rowoldt* decision. The government contends that these issues have been fully determined on appellant's first round through the courts in *MacKay v. Boyd, supra,* where this court said:

> "The ground of MacKay's appeal is that the evidence fails to sustain the finding that he is an alien and so became a member of that party. We find abundant evidence in the testimony of MacKay's wife and other witnesses to sustain the finding."

Appellant's petition for certiorari to the Supreme Court was denied. Counsel however theorizes that by virtue of *Rowoldt* a somewhat different yardstick would apply and that stronger evidence is now necessary to justify a determination of "meaningful association". We do not agree with any such theory. In *Schleich v. Butterfield,* 6 Cir. 1958, 252 F.2d 191; cert. den. (1958) 358 U.S. 814, the court said:

"Rowoldt v. Perfetto did not change the law with respect to the proof necessary to show membership in the Communist Party. Galvan v. Press was recognized as the controlling authority. The different ruling was the result of different factual situations. The court closed its opinion in the Rowoldt case by saying, 'The differences on the facts between Galvan v. Press, supra, and this case are too obvious to be detailed.' (p. 194)

* * *

"Certainly, there is nothing in the record to show that he did not join the Party of his own free will or that he was mistaken about the nature and purposes of the Party at the time of joining and thereafter. His years of membership and active participation in organization work compel the opposite conclusion.

"In our opinion, the foregoing evidence was sufficient to establish the 'meaningful association' with the Party, referred to in the Rowoldt case, and to show that Schleich joined the Party, aware that he was joining an organization known as the Communist Party which operated as a distinct and active political organization and that he did so of his own free will, which, according to the rule laid down in Galvan v. Press, supra, 347 U.S. 522, 528, 74 S.Ct. 737, 98 L.Ed. 911, was enough to constitute him a 'member' within the terms of the Act."

Schleich's Petition for a Writ of Certiorari, which was denied, embraced the following question: "Whether this court should reconsider its decisions in *Galvan v. Press,* 347 U.S. 522, and *Marcello v. Bonds,* 349 U.S. 302."

It would therefore appear that the *Rowoldt* decision was entirely within the framework of the test to be applied as set forth by the Supreme Court in *Galvan v. Press.* Since there was no different standard of proof set up in the *Rowoldt* case it is obvious that the Supreme

Court, in denying certiorari in *MacKay v. Boyd, supra,* considered that MacKay had "meaningful association" by virtue of the length of his membership in the Party, its duration, its continuance during a time of prosperity, his attendance at Communist Party schools and meetings, the purpose of which was to teach members Russian history and fundamentals of Communism, Marxism and Leninism and that it was reasonable to conclude that his membership was with knowledge of the fact that the Communist Party which he had joined was a political organization.

It is significant to note that after the decision in the *Rowoldt* case, *supra,* the Supreme Court denied certiorari in cases challenging the constitutionality of the statute and asking for the overruling of Galvan. *Schleich v. Butterfield, supra; U. S. ex rel Avramovich v. Lehmann* (1957) 355 U.S. 905; *Niukkanen v. Boyd, supra.*

A recent case to enjoin an order of deportation was that of *Wellman v. Butterfield,* 6 Cir. 1958, 253 F.2d 932. There the activities of the party charged were almost identical with the activities of this appellant. The court there said:

> "In our opinion the foregoing evidence was sufficient to show a 'meaningful association' with the Communist Party of the kind referred to in the Rowoldt case, and to establish that the appellant joined the party, aware that she was 'joining an organization known as the Communist Party which operates as a distinct and active political organization . . .' Galvan v. Press supra." (and citing further cases)

As stated above, each of the contentions made under this specification was fully considered and rejected in *MacKay v. Boyd, supra,* which was therefore final and determinative of this issue. *Rystad v. Boyd, supra,* and *Cruz-Sanchez v. Robinson, supra.*

CONCLUSION

Judgment of the District Court dismissing the Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive Relief, discharging the writ of habeas corpus and remanding the appellant to the custody of the District Director of the Immigration & Naturalization Service for deportation, should be, in all things, affirmed. This appellant was found deportable after a fair hearing and under a constitutional statute. The issues urged by appellant in this appeal are merely colorable, rather than genuine, and a further delay in the execution of this valid deportation Order should not be tolerated.

Respectfully submitted,

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